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No. 94-1387

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 17, 1995
Certiorari Granted May 22, 1995

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TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries

United States District Court for the Eastern District of Pennsylvania 1

Third Circuit Court of Appeals 10

Letter Briefs requested by the Third Circuit Court of Appeals discussing *American Dredging v. Miller*, 510 U.S. ___, 114 S.Ct. 981 (1994)

Yamaha's Letter Brief (April 20, 1994)..... 16

Calhouns' Letter Brief (April 20, 1994) 24

Order issued by the United States Supreme Court granting Certiorari (May 22, 1995) 40

The following opinions, decisions, judgments and orders have been omitted from this joint appendix since they appear on the designated pages of the appendix to the printed Petition for Certiorari:

Stipulation to Dismiss Certain Defendants, approved by District Court (Feb. 12, 1991)..... 99a

Orders and Memorandum Opinion, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 90-4295 (Mar. 19, 1992 and Dec. 29, 1992) (Bench Opinion recited Dec. 24, 1992 and issued by the court on June 17, 1993) ... 52a

Order and Memorandum Opinion Denying Motion for Reconsideration of District Court's December 29, 1992 Order and Granting Motion for Certification to the Court of Appeals Pursuant to 28 U.S.C.A. § 1292(b) (June 3, 1993)..... 83a

JOINT APPENDIX – Continued

Order and Memorandum Opinion Amending District Court's June 3, 1993 Order for Certification to Include Questions Raised By Plaintiffs (June 21, 1993) 90a

Orders, Third Circuit Court of Appeals, granting Petition to Appeal Interlocutory Order pursuant to Fed.R.App.P. 5(a) and Consolidating Appeals (July 16, 1993) 97a

Transcript of Oral Argument before the Third Circuit Court of Appeals (April 13, 1994) 101a

Opinion of the United States Court of Appeals for the Third Circuit, Cross-Appeals Nos. 93-1736 and 1737 (3d Cir. Nov. 2, 1994) 1a

Judgment (Nov. 2, 1994) 44a

Order Amending Opinion (Nov. 17, 1994) 47a

Order Denying Petition for Rehearing With Suggestion for Rehearing In Banc (Dec. 7, 1994) 50a

U.S. District Court
U.S. District Court of Eastern Pennsylvania (Philadelphia)

CIVIL DOCKET FOR CASE: # 90-CV-4295

CALHOUN, et al. v.
YAMAHA MOTOR CORP., et al.

Filed: 06/27/90

Assigned to:
JUDGE LOUIS H. POLLAK
Demand: $50,000
Lead Docket: None
Dkt# in other court: None

Jury demand: Plaintiff
Nature of Suit: 365
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Personal Injury

LUCIEN B. CALHOUN and
ROBIN L. CALHOUN,
individually and as
Administrators of the Estate
of Natalie K. Calhoun,
deceased

PLAINTIFFS

v.

WILLIAM J. TAYLOR
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YAMAHA MOTOR
CORPORATION, U.S.A. and
YAMAHA MOTOR CO., LTD.

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PALMAS DEL MAR CO
PALMAS DEL MAR, INC
PALMAS YACHT CLUB
MARINA DE PALMAS
YACHT CLUB, INC.
MAXXAM PROPERTIES
ABC CORPORATION
XYZ PARTNERSHIP
CANDELERO HOTEL CORP
MARINA DE PALMAS
SHIPYARD, INC.

DEFENDANTS

6/27/90	1	Complaint.
6/27/90	–	Demand for jury trial by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN
8/10/90	4	Amended complaint by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN
12/14/90	26	Stipulation of dismissal as to DEFENDANT PALMAS DEL MAR, INC., DEFENDANT PALMAS DEL MAR, CO., DEFENDANT PALMAS YACHT CLUB, DEFENDANT MARINA DE PALMAS, DEFENDANT MAXXAM PROPERTIES, DEFENDANT CANDELERO HOTEL CORP., DEFENDANT MARINA DE PALMAS SHIPYARD, INC.
2/12/91	–	STIPULATION AND ORDER, DISMISSING CERTAIN DEFTS (SIGNED BY JUDGE LOUIS H. POLLAK)
11/27/91	47	MOTION by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP FOR PARTIAL SUMMARY JUDGMENT, MEMORANDUM.
1/10/92	49	Response in opposition by PLAINTIFF ROBIN L. CALHOUN and PLAINTIFF LUCIEN B. CALHOUN to DEFENDANTS' [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT; Oral Argument Requested.

1/27/92	50	Memorandum by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP in support of [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT.
2/4/92	52	ORDER, FOR ORAL ARGUMENT ON 2-21-92 AT 11:00 a.m. (SIGNED BY JUDGE LOUIS H. POLLAK)
2/14/92	53	Reply by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN to response to [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT.
2/26/92	55	Reply by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP to response to [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT.
3/6/92	57	Plffs' rebuttal to response of defts Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, LTD's response to plffs' sur-reply brief regarding defts' motion for partial summary judgment.
3/19/92	58	ORDER GRANTING IN PART AND CONTINUING IN PART DEFTS MOTION FOR PARTIAL SUMMARY JUDGMENT; PARTIES ARE DIRECTED TO SUBMIT THEIR ADDITIONAL BRIEFS TO THE COURT BY 4-3-92 (SIGNED BY JUDGE LOUIS H. POLLAK)
4/3/92	61	Pffs' post-argument brief regarding damages and admiralty law.

4/3/92	62	Brief by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP in support of [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT.
4/15/92	63	Response by DEFENDANT YAMAHA MOTOR CORP, DEFENDANT YAMAHA MOTOR CO. to plffs' [61-1] post-argument brief regarding damages in admiralty law.
4/15/92	64	Reply by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN to defts' [62-1] supplemental brief regarding various issues of maritime damages submitted in support of defts' motion for partial summary judgment.
10/7/92	65	ORDER THAT ORAL ARGUMENT ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT WILL BE HELD ON 11/16/92 AT 10:15 IN COURTROOM 16-B. (SIGNED BY JUDGE LOUIS H. POLLAK).
12/29/92	67	ORDER THAT FOR THE REASONS GIVEN IN THE BENCH OPINION OF 12/24/92, IT IS HEREBY ORDERED THAT THE MOTION OF YAMAHA DEFENDANTS FOR PARTIAL SUMMARY JUDGMENT ON CERTAIN DAMAGE CLAIMS IS DENIED WITH RESPECT TO PLAINTIFFS' CLAIMS FOR (a) DAMAGES FOR LOSS OF SUPPORT

		AND SERVICES AND (b) DAMAGES FOR LOSS OF SOCIETY; AND GRANTED WITH RESPECT TO PLAINTIFFS' CLAIMS FOR (a) DAMAGES FOR LOSS OF FUTURE EARNINGS AND (b) PUNITIVE DAMAGES. (SIGNED BY JUDGE LOUIS H. POLLAK)
2/12/93	72	MOTION BY DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP FOR RECONSIDERATION OF [67-1] ORDER WHICH DENIED YAMAHA'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS REGARDS DAMAGES FOR LOSS OF SOCIETY UNDER MARITIME LAW, OR, IN THE ALTERNATIVE TO CERTIFY THIS ISSUE FOR APPEAL, MEMORANDUM.
2/18/93	73	Response by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN in opposition to DEFENDANTS' [72-1] MOTION FOR RECONSIDERATION OF [67-1] ORDER, Memorandum.
2/23/93	75	Reply Brief by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP in support of [72-1] MOTION FOR RECONSIDERATION OF [67-1] ORDER.
6/2/93	78	Supplemental Brief in Support of DEFENDANT YAMAHA MOTOR

		CO., DEFENDANT YAMAHA MOTOR CORP of their Motion for Reconsideration.
6/2/93	79	ORDER DENYING DEFENDANTS' [72-1] MOTION FOR RECONSIDERATION OF [67-1] ORDER; AND GRANTING DEFENDANTS' [72-2] MOTION TO CERTIFY THIS ISSUE FOR APPEAL (SIGNED BY JUDGE LOUIS H. POLLAK)
6/9/93	82	MOTION BY PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN TO AMEND [79-1] ORDER, TO CERTIFY FOR INTERLOCUTORY APPEAL THE ORDER ENTERED ON 12/29/92, AND TO STAY PROCEEDINGS, MEMORANDUM.
6/21/93	84	MEMORANDUM OPINION (SIGNED BY JUDGE LOUIS H. POLLAK)
6/21/93	85	MEMORANDUM AND ORDER THAT THE CERTIFICATION PURSUANT TO 28 U.S.C. SECTION 1292(d) CONTAINED IN THE ORDER OF 6/3/93 IS HEREBY AMENDED, ETC.; AND STAYING PROCEEDINGS IN THIS COURT PENDING WHATEVER ACTION MAY BE TAKEN BY THE COURT OF APPEALS WITH RESPECT TO THE QUESTIONS CERTIFIED TO THAT COURT IN PARAGRAPH 1 OF THIS ORDER PURSUANT TO 28 U.S.C. SECTION 1292(d). (SIGNED BY JUDGE LOUIS H. POLLAK)

7/13/93	87	ORDER THAT THE CLERK OF COURT MARK THIS ACTION CLOSED FOR STATISTICAL PURPOSES AND PLACE THE MATTER IN THE CIVIL SUSPENSE FILE, ETC. (SIGNED BY JUDGE LOUIS H. POLLAK)
7/19/93	88	Certified copy of order from U.S. Court of Appeals RE: Petition for permission to appeal from an Interlocutory Order pursuant to 28 U.S.C. Section 1292(b) and F.R.A.P. 5(a); Petition is granted. Judge Nygaard would deny the petition. (Court of Appeals No. 93-8054)
7/19/93	89	Certified copy of order from U.S. Court of Appeals RE: Petition for permission to appeal from an Interlocutory Order pursuant to 28 U.S.C. Section 1292(b) and F.R.A.P. 5(a); Petition is granted. This appeal will be consolidated with the appeal at Court of Appeals No. 93-8054. (Court of Appeals No. 93-8063)
7/30/93	–	Notice of Docketing ROA from USCA; USCA NUMBER: 93-1736.
7/30/93	–	Notice of Docketing ROA from USCA; USCA NUMBER: 93-1737.
9/2/93	–	RECORD COMPLETE FOR PURPOSES OF APPEAL.

12/15/94	91	Certified copy of order from USCA dated 12/15/94, that on consideration whereof, it is now hereby ordered and adjudged by this Court that the order of the said District Court entered 12/29/92, which was certified for immediate interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b) by order entered 6/3/93, which, in turn, was amended by order entered 6/21/93, be and the same is hereby affirmed with respect to the denial of defendant's motion for summary judgment on loss of society and loss of support damages, but reversed with respect to the grant of defendant's motion for summary judgment on lost future earnings and punitive damages. The parties shall bear their own costs.
1/4/95	92	ORDER THAT A STATUS CONFERENCE WILL BE HELD ON WEDNESDAY, 1/11/95 AT 4:30 P.M. (SIGNED BY JUDGE LOUIS H. POLLAK)
1/19/95	95	Minute entry: Status Conference held 1/19/95. Court addresses counsel. Counsel Dryer addresses court re: deft. is preparing petition for certiorari seeking Supreme Court review. Counsel Taylor addresses the court. Court agrees that this case should remain in suspense pending the outcome of the petition for certiorari.

1/20/95	96	ORDER THAT IT APPEARING TO THE COURT THAT THE ABOVE ENTITLED CASE SHOULD BE TRANSFERRED FROM THE CIVIL SUSPENSE FILE, IT IS ORDERED THAT THE CLERK OF COURT TRANSFER SAID CASE FROM THE CIVIL SUSPENSE FILE TO THE CURRENT DOCKET FOR FINAL DISPOSITION. (SIGNED BY JUDGE LOUIS H. POLLAK)
1/20/95	97	ORDER THAT THIS CASE IS TO BE RETURNED TO SUSPENSE PENDING THE SUPREME COURT'S DISPOSITION OF THE CERTIORARI PETITION. IF THE PETITION IS DENIED, THE CASE WILL THEN BE WITHDRAWN FROM SUSPENSE. IF THE PETITION IS GRANTED, THE CASE WILL REMAIN IN SUSPENSE UNTIL THE SUPREME COURT DETERMINES THE MERITS. (SIGNED BY JUDGE LOUIS H. POLLAK)

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Filed: 7/30/93

Court of Appeals Docket: # 93-1736 (Appeal) and 93-1737 (Cross-Appeals)
Nsuit: 4365 P.I.: Product Liability
Calhoun, et al. v. Yamaha Motor Corp., et al.
Appeal from: Eastern District of Pennsylvania

Lower court information:

District: 0313-2 : 90-04295
Trial Judge: Louis H. Pollak, District Judge
Date Filed: 6/27/90
Date order/judgment: 7/16/93
Date NOA filed: 7/16/93

Fee status: paid

Prior cases:

None

Current cases:

Lead	Member	Start	End
Cross-appeal:			
93-1736	93-1737	7/30/93	12/15/94

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, individually and as Administrators of the Estate of Natalie K. Calhoun, deceased

Appellees

v.

YAMAHA MOTOR CORP, U.S.A. and YAMAHA MOTOR CO, LTD

Appellants

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LUCIEN B. CALHOUN; ROBIN L. CALHOUN, individually and as Administrators of the Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.;
YAMAHA MOTOR CO., LTD.;
PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.;
PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.;
MAXXAM PROPERTIES, INC.; ABC CORPORATION;
XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION;
MARINA DE PALMAS SHIPYARD, INC.

Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd.,

Appellants

7/30/93	CIVIL CASE DOCKETED. Notice filed by Yamaha Motor Corporation, U.S.A. & Yamaha Motor Company, Ltd. [93-1736 (Appeal)]
7/30/93	CIVIL CASE DOCKETED. Notice filed by Lucien B. Calhoun and Robin L. Calhoun, individually and as Administrators of the Estate of Natalie K. Calhoun, deceased. [93-1737 (Cross-Appeal)]
8/6/93	APPEARANCE from Attorney Jonathan Dryer on behalf of Appellants Yamaha Motor Corporation, USA & Yamaha Motor Co., Ltd., filed.
8/6/93	INFORMATION STATEMENT on behalf of Appellants Yamaha Motor Corporation, USA & Yamaha Motor Co., Ltd., RECEIVED.
8/6/93	(POSITIVE) DISCLOSURE STATEMENT filed on behalf of Appellant Yamaha Motor Corp advising: Yamaha Motor Co., Ltd., a publicly traded company owns 100% of the stock of Yamaha Motor Corp., USA.
8/11/93	BRIEFING NOTICE ISSUED: Appellant/ cross-appellee br and apx due 9/20/93, filed.
8/12/93	APPEARANCES from Attorneys William J. Taylor & Thomas A. Masterson, Jr. on behalf of Appellees Lucien B. Calhoun & Robin L. Calhoun, filed.
8/12/93	DISCLOSURE STATEMENT on behalf of Appellees Lucien B. Calhoun & Robin L. Calhoun, filed.

9/17/93	1ST STEP BRIEF and APPENDIX on behalf of Yamaha Motor Corp and Yamaha Motor Co Ltd. Pages: 48, Delivered by mail, filed. Certificate of Service dated 9/17/93.
10/18/93	2ND STEP BRIEF on behalf of Lucien B. Calhoun and Robin L. Calhoun. Pages: 48, Copies: 10, Delivered by mail, filed. Certificate of service date 10/18/93.
11/19/93	3RD STEP BRIEF on behalf of Yamaha Motor Corp and Yamaha Motor Co Ltd. Pages: 50 Copies: 10 Delivered by mail. Certificate of service date 11/19/93.
12/6/93	4TH STEP BRIEF on behalf of Lucien B. Calhoun and Robin L. Calhoun. Copies: 10 Delivered by mail. Certificate of service date 12/6/93.
1/13/94	CALENDARED for Wednesday, April 13, 1994. Rescheduled.
4/13/94	ARGUED 4/13/94 Panel: Becker, Mansmann and Scirica, Circuit Judges. At oral argument the Court requested counsel to file an original and 3 copies of memo in letter form on American Dredging case within one week.
4/20/94	ANSWER received in accordance with the Court's request of 4/13/94 from Appellees/Cross-Appellants Lucien B. Calhoun and Appellee Robin L. Calhoun in 93-1736 and 93-1737, filed.

4/20/94	ANSWER received in accordance with the Court's request of 4/13/94 from Appellants/Cross-Appellees Yamaha Motor Corp and Yamaha Motor Co Ltd in 93-1736 and 93-1737, filed.
6/29/94	LETTER dated 6/29/94 received pursuant to Rule 28(j) from counsel for Appellants/Cross-Appellees Yamaha Motor Corp and Yamaha Motor Co Ltd in 93-1736 and 93-1737.
11/2/94	OPINION (Becker, Authoring Judge, Mansmann, Scirica, Circuit Judges), filed.
11/2/94	JUDGMENT: Affirmed in part and reversed in part. Parties bear their own costs, filed.
11/16/94	PETITION by Yamaha Motor Corp et al in 93-1736, in 93-1737 for rehearing in banc. Certificate of service dated 11/16/94, filed.
11/17/94	ORDER AMENDING OPINION Becker, Authoring Judge, Mansmann, Scirica, Circuit Judges, filed.
12/7/94	ORDER (Sloviter, Chief Judge, Becker, Authoring Judge, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, McKee, Sarokin, Circuit Judges) denying petition for in banc rehearing by Appellant Yamaha Motor Corp, Yamaha Motor Co Ltd, Appellee Yamaha Motor Corp, Yamaha Motor Co Ltd. in 93-1736, 93-1737, filed.

12/15/94	MANDATE ISSUED, filed. (93-1737)
1/30/95	REPORTER at 40 F.3d: 622
2/24/95	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant Yamaha Motor Corp in 93-1736, Appellant Yamaha Motor Co Ltd in 93-1736, Appellee Yamaha Motor Corp in 93-1737, Appellee Yamaha Motor Co Ltd in 93-1737. Filed in the Supreme Court on 2/17/95 at Supreme Ct. case number: 94-1387.
5/25/95	Order Allowing Certiorari: U.S. Supreme Court order dated 5/22/95 at S.C. number: 94-1387, granting petition for writ of certiorari by Appellant Yamaha Motor Corp, et al. in 93-1736, 93-1737, LIMITED to question 1 presented by the petition. In addition to question 1 presented by the petition, the parties are requested to brief & argue the following question: "Under 28 USC Sec 1292(b), can the Court of Appeals exercise jurisdiction over any question that is included w/in the order that contains the controlling question of law identified by the District court?", filed.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER

The Curtis Center Suite 830 E
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[Rest Of Letterhead Omitted In Printing]

April 20, 1994

Clerk of the Court
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Attention: P. Douglas Sisk

Re: Lucien B. Calhoun, et al. v. Yamaha Motor Corporation, U.S.A., et al.
Docket Nos. 93-1736/1737
Our File No.: 00210.29423

Dear Mr. Sisk:

We are writing at the invitation of Judges Becker, Mansmann and Scirica to address the impact of *American Dredging Co. v. Miller*, 114 S.Ct. 981 (1994), first cited by counsel for the Calhouns during the oral argument in this matter which took place on April 13, 1994. Upon review of this opinion, it is apparent that the Calhouns' citation of this case is most noteworthy as further evidence of their fundamental misunderstanding of the interplay between state and federal considerations in the law of admiralty. The *American Dredging* opinion not only fails to stand for the proposition for which it was cited by the

Calhouns (that state wrongful death and survival statutes remain applicable in territorial waters), it in fact confirms precisely the opposite, as Yamaha has argued throughout the course of this action: the creation of a uniform federal common law maritime remedy has precluded the further applicability of substantive state remedial statutes.

The *American Dredging* case arose when plaintiff, a seaman on a tugboat owned by American Dredging Company, was injured while in the course of his employment in Pennsylvania. After receiving medical treatment in Pennsylvania, New York and Mississippi, he eventually filed suit in Louisiana state court seeking damages under the Jones Act and general maritime law. American Dredging filed a motion to dismiss the action under the doctrine of *forum non conveniens* which was granted by the trial court, holding it was bound by federal law to apply the doctrine. After the Louisiana Court of Appeals for the Fourth District affirmed, the Supreme Court of Louisiana reversed, upholding the validity and applicability of Article 123(C) of the Louisiana Code of Civil Procedure, which renders the doctrine of *forum non conveniens* unavailable in Jones Act and maritime law cases brought in Louisiana state court. American Dredging filed a petition for writ of certiorari, which was granted by the United States Supreme Court. The issue before the Supreme Court was whether the Louisiana statute abolishing *forum non conveniens* had been preempted by federal maritime law.

In order to determine whether federal law was preemptive, the court recognized the traditional coextension of state and federal admiralty jurisdiction:

> In exercising *in personam* jurisdiction, however, a state court may "adopt such remedies, and . . . attach them to such incidents, as it sees fit" so long as it does not attempt to make changes in the "substantive maritime law" . . . That proviso is violated when the state remedy "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

American Dredging, 114 S.Ct. at 985 (*citations omitted*). Concluding the doctrine of *forum non conveniens* was neither a characteristic feature of admiralty nor a doctrine whose uniform application is necessary to maintain the harmony of maritime law, the court determined the Louisiana statute did not impermissibly intrude into the province of federal maritime law.

The court's reasoning in deciding *forum non conveniens* is not a characteristic feature of admiralty is not germane to this appeal. However, the discussion of uniformity is both highly relevant and, contrary to the arguments advanced by the Calhouns' counsel, directly supportive of Yamaha's position.

The *Miller* court recognized numerous instances in which (as argued by Yamaha herein) the applicability of state law had been preempted in the name of uniformity. The court also recognized, in the portion of the opinion cited by the Calhouns' counsel at argument and appearing at p. 987, that the requirement of uniformity is not absolute. After considering the competing interests involved, the court held:

> Wherever the boundaries of permissible state regulations may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.
>
> As to the former point: At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision . . . But venue is a matter that goes to process rather than substantive rights – determining which among various competent courts will decide the case.
>
> Uniformity of process (beyond the rudimentary elements or procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all courts of the world.

American Dredging at 988.

This statement goes to the heart of Yamaha's position, that maritime jurisprudence envisions each and every party who brings an action for wrongful death within maritime jurisdiction receiving the same substantive remedy. Regardless of whether the decedent is a civilian or a seaman, or whether the death occurred within the territorial waters or on the high seas, each petitioner should be in a position to seek the same redress from the courts. *Forum non conveniens* is not a factor which affects the uniformity of federal maritime law for the simple reason that whichever court ultimately is chosen to hear the case must apply the same law. While state

and federal courts have concurrent jurisdiction over maritime cases, " . . . the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie doctrine' which requires that the substantive remedies afforded by states conform to governing federal maritime standards," *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 106 S.Ct. 2485, 2494 (1986) (*citations omitted*). The doctrine of *forum non conveniens* does not change the applicable law; it merely changes the location of the court which will apply it.

In conflicts between state and federal law involving substantive rather than procedural issues, the *American Dredging* court recognized that federal law is invariably preemptive. For example, in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202 (1953), the Supreme Court held that Pennsylvania courts must apply the admiralty rule that contributory negligence was no bar to recovery, rather than the Pennsylvania rule recognizing such a defense; *Garrett v. Moore-McCormick Co.*, 317 U.S. 239, 63 S.Ct. 246 (1942), applied the federal admiralty standard of burden of proof to the question of the validity of a release; and in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) (the case upon whose rationale *American Dredging* was based), the Supreme Court disallowed application of state workers' compensation statutes to injuries covered by the admiralty jurisdiction. *Jensen* is clearly similar to the instant case – the Supreme Court prohibited a state statutory remedy in conflict with a remedy afforded by federal maritime law.

It would be difficult to find an area of law more substantive than the question of damages to be afforded an injured plaintiff. Whether a given court should afford

a plaintiff a uniform maritime remedy or permit the utilization of the widely varied state statutes certainly cannot be described as "procedural." These are substantive rights which, under the Supreme Court analysis in *American Dredging*, clearly fall within an area where it is necessary to maintain the proper "harmony and uniformity" of maritime law. In fact, the Court again refers to *The Lottawanna*, (21 Wall.) 558, 575, 22 L.Ed. 654 (1875), where Justice Bradley said of the Article III provision extending federal judicial power "to all Cases of admiralty and maritime Jurisdiction":

> One thing . . . is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

This is the precise language recognized by the Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970), as justification for its adoption of a general maritime wrongful death action to avoid the ongoing confusion and disparities which continued to arise from application of the federal maritime statutes on the one hand and the wrongful death and survival statutes of the several states on the other.

The *American Dredging* opinion does contain the following quote, read by the Calhouns' counsel at oral argument:

> State remedies for wrongful death and state statutes providing for the survival of actions . . . have been upheld when applied to maritime causes of action. . . .

American Dredging, 114 S.Ct. at 987. However, this quote is taken directly from *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374, 79 S.Ct. 468, 480-481, 3 L.Ed.2d 368 (1959), a case which predates *Moragne* by some 11 years and was therefore decided at a time when there was no conflicting federal law to preempt state law. As the *American Dredging* court further noted:

> What we have concluded from our analysis of admiralty law in general is strongly confirmed by examination of federal legislation. While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field.

American Dredging, 114 S.Ct. at 989.

The Supreme Court has already ruled that damages for loss of society are not available to the survivors of a civilian proceeding under the Death on the High Seas Act, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010 (1977), or a Jones Act seaman, *Miles v. Apex Marine*, 498 U.S. 19, 111 S.Ct. 317 (1990). The *Miles* court also precluded recovery of lost future wages in a general maritime survival action. As the court notes in *American Dredging*, above, the uniformity which has been the touchstone of the emerging trend of maritime jurisprudence can only be fostered if the common law is developed in harmony with the enactments of Congress in the

field. Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. therefore respectfully request this court to follow the lead of the Second Circuit in *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (1993), *cert. den.*, 114 S.Ct. 1060 (1994), reverse that portion of the lower court opinion permitting damages for plaintiffs' loss of society, and affirm the remainder of that decision.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER

/s/ Jonathan Dryer
Jonathan Dryer
William R. Hoffman

JD/WRH/lmh

cc: Thomas Masterson, Esq.

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[Rest Of Letterhead Omitted In Printing]

April 20, 1994

Via Hand Delivery

P. Douglas Sisk, Clerk
United States Court of Appeals
for the Third Circuit
U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Calhoun, et al. v. Yamaha Motor Corp., U.S.A., et al.
Nos. 93-1736/1737

Dear Mr. Sisk:

As directed by the Court during oral argument on Wednesday, April 13, 1994, plaintiffs are providing, for filing and circulation to the Court, an original and three copies of this letter-brief discussing the significance of *American Dredging Company v. Miller,* 510 U.S. ___, 114 S. Ct. 981, 127 L. Ed. 2d 285, which was decided by the

United States Supreme Court on February 23, 1994. That case, and particularly the discussion at 127 L. Ed. 2d 296 and in Justice Stevens' concurring opinion at L. Ed. 2d 300-303, directly supports the Calhouns' arguments regarding federalism and admiralty and admiralty's implementation of specific state statutes as discussed in the Calhouns' Main Brief at pages 18-23 and in the Calhouns' Reply Brief at pages 3-12.

In *American Dredging,* the Supreme Court held that federal admiralty law does *not* preempt the application of a Louisiana state statute that expressly renders the federal doctrine of *forum non conveniens* inapplicable in Jones Act and federal admiralty cases.

In discussing the concept of "uniformity in admiralty" which Yamaha has advanced in the instant case as an absolute and inflexible doctrine that precludes admiralty's implementation of state statutes, the Supreme Court stated in *American Dredging* as follows:

> The requirement of uniformity is not, however, absolute. As *Jensen* itself recognized: '[I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied' . . . A later case describes to what breadth this 'some extent' extends:
>
> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and

> state statutes providing for the survival of actions . . . have been upheld when applied to maritime causes of action. . . . State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance – all these laws and others have been accepted as rules of decision in admiralty cases even, at times, when they conflicted with a rule of maritime law which did not require uniformity. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959) (footnotes omitted).

127 L. Ed. 2d at 296.

Thus, as recently as February 23, 1994, the Supreme Court has acknowledged and approved two of the major admiralty concepts asserted by the Calhouns in the instant case. The first is that the concept of uniformity in admiralty is *not* absolute and inflexible and that state laws *may* be given effect within admiralty jurisdiction. The second concept is that "state remedies for wrongful death and, state statutes providing for survival of actions have been upheld when applied to maritime causes of action" and have long been recognized by the Supreme Court as not abrogating any uniformity requirement of admiralty. *See e.g. Western Fuel Co. v. Garcia*, 257 U.S. 233, at 242, 42 Sup. Ct. 89, 66 L. Ed. 210 at 214 (1921) ("As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in

personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will *not* work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." (emphasis added)); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 125, 44 S. Ct. 274, 68 L. Ed. 582, 587 (1924), (state statutes "giving the substantive right to recover for negligence resulting in death were upheld, [in admiralty] because they merely supplemented the substantive maritime law, and did not conflict with any essential feature of it."); *Just v. Chambers*, 312 U.S. 383, 387, 61 S. Ct. 687, 691 85 L. Ed. 2d 903, 907 (1941), ("it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject"); *The Tungus*, 358 U.S. 588, 594, 79 S. Ct. 503, 507 3 L. Ed. 2d 524, 529 (1959) ("there is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even *Southern P. Co. v. Jensen*, which fathered the 'uniformity' concept, recognized that uniformity is not offended by the right given to recover in death cases.")

In *Romero v. International Terminal Operating Co.*, cited by the Supreme Court in *American Dredging*, in discussing the interaction of state and federal law in admiralty the Supreme Court stated: "although the corpus of admiralty

law is federal in the sense that it derives from the implications of Article 3 evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce."[1] 358 U.S. 354, 382, 79 S. Ct. 468 at 480, 3 L. Ed. 2d 368, 382.

Plaintiffs respectfully submit that the foregoing Supreme Court cases and the statements of the Supreme Court in *American Dredging* regarding the interaction between state and federal law control the issue before this Court regarding the determination of the extent of damages that the Calhouns may seek to recover for the death of their daughter.

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[1] Contrary to the assertions of Yamaha's counsel during oral argument, just because a case is determined to be within admiralty jurisdiction does not mean that all state interests, statutes and laws are automatically preempted. The Supreme Court cases relied upon by Yamaha at oral argument, *Foremost*, *Sisson* and *Dau Van Tran* are all cases that deal exclusively with the issue of the extent of admiralty jurisdiction. None of those Supreme Court decisions considered the issue of what damages may be sought in a case that is determined to be within admiralty's jurisdiction. Also, it should be noted that although Judge Pollak determined that the instant case was within admiralty's jurisdiction plaintiffs have not conceded the correctness of that jurisdictional determination and retain their right to have it reviewed on appeal.

Yamaha may attempt to discount the significance of *American Dredging* by arguing that damages are substantive and not a procedural device as the doctrine of *forum non conveniens* was determined to be in *American Dredging*. Plaintiffs submit that even if damages are correctly characterized as substantive, the undisputed fact is that uniformity of damages in actions involving nonseamen and arising from deaths on state territorial waters is not now and has never been a "characteristic feature of admiralty law". 127 L. Ed. 2d at 293.

Applying the same analysis utilized by the Supreme Court in *American Dredging*, the issue in the instant case may be stated as follows: whether uniform wrongful death and survival damages in actions involving nonseamen and arising from deaths within state territorial waters are either a "characteristic feature" of admiralty or a doctrine whose uniform application is necessary to maintain the proper harmony of maritime law. 127 L. Ed. 2d at 293.

As discussed in many of the Supreme Court cases cited above, wrongful death and survival actions and damages for such actions were never considered to be a characteristic feature of admiralty. That is why admiralty courts in the United States have, almost from their inception, "implemented", "borrowed", "absorbed" or "incorporated" into admiralty the wrongful death and survival statutes available in the relevant coastal states.

The concept of implementing state law and absorbing it into admiralty to provide damages was expressly approved by the Supreme Court in *Moragne*. Clearly, the

Supreme Court was not concerned in *Moragne* with establishing "uniformity of damages". On the contrary, the Court referred to "the Death on the High Seas Act and the numerous state wrongful death acts [which] have been implemented [in admiralty] with success for decades." At 26 L. Ed. 2d 339 at 361.[2]

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[2] Contrary to the assertions of Yamaha's counsel at oral argument, the Supreme Court did not state in *Moragne* that "DOHSA was to be the "primary model" in determining what damages could be recovered in a *Moragne* wrongful death cause of action. Indeed, the Supreme Court has stated that "the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law". *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 at 283, 64 L. Ed. 2d 284, at 292 100 S. Ct. 1673 (1980). In addition, contrary to the statements made by Yamaha's counsel at oral argument, the Supreme Court did not refer in *Moragne* to the "collective law" of the states or to the law of the "majority of the states." Rather, the Court referred to "the numerous state wrongful-death acts" [which] "have been implemented [in admiralty] with success for decades". That statement was a clear reference to cases like *Western Fuel, Red Cross Line, Just v. Chambers* and *The Tungus* which allowed the implementation of state statutes within admiralty's jurisdiction. Thus, even if this Court were to determine that the Calhouns' wrongful death and survival actions are general federal maritime wrongful death and survival actions, and that plaintiffs' substantive rights to recover for negligence and products liability are premised upon general federal admiralty law, the damages recoverable in such actions are those provided in specific relevant state damages statutes and *not* those set forth in the DOHSA or the Jones Act. Plaintiffs' position is that with regard to *damages* in wrongful death and survival actions whether a commercial ship hits a jet ski or vice a versa, if the incident occurs within state territorial waters and the person killed is not a seaman, admiralty law allows the implementation of relevant state damages statutes. That is so regardless of

Just as the Supreme Court determined in *American Dredging* that "there is no basis for regarding *forum non conveniens* as a doctrine that originated in admiralty" 127 L. Ed. 2d at 295 there is similarly no basis for concluding that wrongful death and survival actions, or the damages for such actions, originated in admiralty. On the contrary, the Supreme Court's discussion in *Moragne* makes clear that until *Moragne*, absent an applicable state statute, the Jones Act or DOHSA there was no wrongful death action in admiralty.[3] *Moragne* 26 L. Ed. 2d 352-358. Thus, it

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whether it is determined that the wrongful death and survival *right of action* is premised upon general federal admiralty law or upon the state statutes themselves. Under longstanding federalism principles in admiralty as well as under the doctrine of depecage, different issues (*e.g.*, liability vs. damages) arising out of a single set of facts may be decided pursuant to the law of different jurisdictions. *Broome v. Antlers' Hunting Club*, 595 F.2d 921, 723 N.5 (3rd Cir. 1979). Thus in the instant case, liability issues may be determined by federal admiralty substantive law and the damages issues may be determined in admiralty by implementing state law.

[3] Plaintiffs' position is that the wrongful death cause of action fashioned by the Supreme Court in *Moragne* is limited to wrongful death causes of action based upon the warranty of seaworthiness and is thus limited to seamen. As discussed more fully in plaintiffs' Main Brief pp. 8-17 and Reply Brief pp. 3-9, support for plaintiffs' interpretation of the limited nature of the *Moragne* decision is found in numerous decisions. The limited holding of *Moragne* was also re-affirmed by the Supreme Court in *Miles*. There the Supreme Court stated: "If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for the wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*. 112 L. Ed. 2d 275 at 289. Because the Supreme Court has expressly limited the general maritime wrongful death cause of action to the wrongful death of a

cannot reasonably be concluded that wrongful death actions or damages for maritime deaths "originated in admiralty". Also, like the doctrine of *forum non conveniens* discussed in *American Dredging*, the doctrine of awarding damages in wrongful death and survival actions neither originated in admiralty nor has exclusive application there. On the contrary, like *forum non conveniens*, awarding damages in wrongful death and survival actions has long been a doctrine of general application. Thus, a decision by this Court to allow the Calhouns to seek to recover the damages provided by the law of Pennsylvania, in a case involving the death of a Pennsylvania resident within state territorial waters, will not in any way "work material prejudice to [a] characteristic feature of the general maritime law". There is no characteristic feature of the general maritime law that precludes implementing particular state damages statutes in a case involving the death of a nonseaman in state territorial waters.

That specific state laws may be given effect in admiralty matters and may affect or impair commerce has been accepted in admiralty for many years. As noted by Justice Stevens in his concurring opinion in *American Dredging* in discussing the concept of admiralty uniformity and *forum non conveniens:*

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seaman, *Moragne* did not take away any pre-*Moragne* rights, remedies and damages for maritime wrongful deaths. Thus, it remains permissible in admiralty to implement specific state wrongful death and survival statutes.

> [e]qually significant is the fact that Congress, which has unquestioned power to decree uniformity in maritime matters, has declined to set forth a federal forum convenience standard for admiralty cases.
>
> * * *
>
> When relevant federal legislation indicates that Congress has opted to permit state "diversity" in admiralty matters, a finding of federal preemption is inappropriate. Just as in cases involving non-maritime subjects, *see e.g., Cippolone v. Liggett Group, Inc.*, 505 U.S. ___, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) . . . we should not lightly conclude that the federal law of the sea trumps a duly enacted state statute.

127 L. Ed. 2d 301-302.

Just as Justice Stevens noted in *American Dredging* when discussing *forum non conveniens*, plaintiffs in the instant case have pointed out what Justice Stevens characterized as the "significant" fact that Congress has declined to set forth a uniform damages standard for admiralty cases arising from accidents within state territorial waters. Even more significant is the fact that Congress has, in a relevant federal statute, expressly stated that it has opted to permit state "diversity" in admiralty matters occurring within state territorial waters. That federal statute is the DOHSA. There, Congress, as repeatedly acknowledged by the Supreme Court, has expressly stated that the operation of state death statutes are to be protected in actions involving deaths occurring within state territorial waters.

For example, in *Romero*, the Supreme Court expressly acknowledged that "Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence." *Romero* at 358 U.S. 374 N. 42, 79 S. Ct. 468 at 481 N. 42, 3 L. Ed. 2d at 383 N. 42. (Note 42 also contains a detailed discussion of why state statutes may be implemented within admiralty jurisdiction.)

Similarly, in *The Tungus*, the Supreme Court expressly acknowledged that "the legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to . . . deaths on waters within the territorial jurisdiction of the states. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law." 358 U.S. at 593 79 S. Ct. at 587 3 L. Ed. 2d at 529.

In *Moragne*, in discussing the legislative history of the DOHSA, the Supreme Court quoted from the legislative history and expressly recognized that the concern of Congress in passing DOHSA was that a right of action for death on the high seas be created "leaving unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the states" and that "the power of the states to create actions for wrongful death in no way be affected". *Moragne* 26 L. Ed. 2d at 355.

In *Gaudet* 39 L. Ed. 2d 9 at 23, N.22, the Supreme Court noted that "Congress' insistence that the Act not extend to territorial waters, indicates that Congress was

not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act."

Similarly in *Tallentire*, 477 U.S. 207, 227, 91 L. Ed. 2d 174, 192, 106 S. Ct. 2485, the Supreme Court examined the legislative history of the DOHSA and concluded that DOHSA expressly sanctioned "the operation of state wrongful death statutes . . . in territorial waters".[4]

Thus, consistent with the federalism analysis articulated by the Supreme Court in the cases discussed above and in *American Dredging*, this Court should acknowledge and respect the will of Congress as expressed in the DOHSA and continue to permit the implementation of relevant state damages statutes in an admiralty matter involving the death of a nonseaman occurring within state territorial waters.

Plaintiffs submit that the primary motivating federal interest in admiralty is the protection of seamen. Thus, as long as seamen and their families are uniformly protected

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[4] Contrary to the statements of Yamaha's counsel at oral argument, *Tallentire* and *Dugas* are not the same case and *Tallentire* does not undercut *Dugas* at all. *Tallentire* held only that a state wrongful death statute could not be applied to a DOHSA wrongful death claim. *Dugas* did not involve the application of a state wrongful death statute on the high seas. *Dugas* involved the application of a state survival statute in conjunction with a DOHSA claim. There was no preemption problem in *Dugas* because DOHSA is not a survival claim statute.

and guaranteed their federal remedies against state impairment there is no basis to hold that the application of state damages statutes are preempted and may not be utilized in actions involving the deaths of non-seamen in state territorial waters. As noted by the Supreme Court in *American Dredging*, there are numerous instances when state laws are given effect in admiralty. 127 L. Ed. 2d 296. Accordingly, those who avail themselves of business in maritime commerce will frequently be subjected to the rights and interests of the various states in whose waters they choose to travel and trade. Yamaha markets its products in all 50 states and all over the world and thereby voluntarily subjects itself to a myriad of different laws, duties and damages. Thus, Yamaha does not rely upon the damages law of any one particular jurisdiction in planning its business.

Moreover, there is no reason why a federal interest in protecting interstate maritime commerce should be given more weight than the federal interest in protecting interstate commerce on federally funded, regulated and controlled interstate highways, railways or airways. There is no justification on public policy or commerce grounds to conclude that there must be uniformity of damages for deaths occurring in state territorial waters when there is no such requirement or interest in uniformity of damages for deaths occurring on interstate highways or railways or concerning deaths resulting from interstate aviation.

Indeed, of the four types of cases and commerce – admiralty, interstate highway, interstate railway, and interstate aviation – only admiralty has enunciated a principle wherein the Supreme Court has characterized admiralty proceedings as "humane and liberal" and has

held that a death remedy should be provided "when not required to be withheld by established and inflexible rules." That principle has been traced to an early admiralty case, *The Sea Gull*, 21 F. Cas. 909 (No. 12, 578)) (CC Md. 1865). That principle has been acknowledged by many courts including the Supreme Court in *Moragne*, 26 L. Ed. 2d 339 at 349 and this Court in *Dugas*, 438 F.2d 1386 at 1391 N. 8. That long established admiralty principle must be considered in any analysis of federal and state interests. That principle supports plaintiffs' position that this Court should not, as Yamaha requests, severely limit the damages the Calhouns may seek, thereby denying the Calhouns any effective remedy in admiralty for the death of their daughter within state territorial waters.[5]

In discussing the issue of what impact state law may have on commerce in admiralty the Supreme Court stated in *American Dredging*, "whatever might be the unifying theme of this aspect of our admiralty jurisprudence, it assuredly is *not* what the dissent takes it to be, namely, the principle that the states may not impair maritime commerce". 127 L. Ed. 2d at 296 N. 3.

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[5] Had Natalie Calhoun been seriously injured in the subject accident rather than killed, there is no doubt that the general federal admiralty law regarding personal injury actions would have provided her with complete damages including loss of income, punitive damages, medical expenses and pain and suffering. Davis, *Maritime Law Deskbook*, § V.B. 1 and 2, *Personal Injuries to Seamen, Passengers and Invitees* (1989). There is absolutely no rational basis to conclude that because her injuries were serious enough to cause death that admiralty law does not allow any significant damages.

In his concurring opinion, Justice Stevens goes even farther:

> While I do not propose that we abandon commerce as a guiding concern, we should recognize that, today, the federal interest in free trade and uniformity are amply protected by other means. Most importantly, we now recognize Congress' broad authority under the Commerce Clause to supplant state law with uniform federal statutes. Moreover, state laws that affect maritime commerce, interstate and foreign, are subject to judicial scrutiny under the Commerce Clause. And to the extent that the mere assertion of state judicial power may threaten maritime commerce, the Due Process Clause provides an important measure of protection for out-of-state defendants, especially foreigners.

127 L. Ed. 2d at 302. Thus, because Congress has elected not to supplant state laws with a federal statute establishing uniform liabilities and uniform damages for deaths within state territorial waters, this Court should not attempt to effect the same result in the name of the vague and criticized concept of uniformity in admiralty.

In *American Dredging*, the Supreme Court has expressly sanctioned the federal-state interest analysis advocated by plaintiffs in the instant case. That analysis leads to the conclusion that this Court may properly implement in admiralty the wrongful death and survival damages of the Commonwealth of Pennsylvania in this

case which arises from the death of a 12 year old Pennsylvania resident who died as a result of riding a Yamaha recreational vehicle in state territorial waters.

Respectfully submitted,

/s/ Thomas A. Masterson, Jr.
Thomas A. Masterson, Jr.

TAM JR:loc

cc: Jonathan Dryer, Esquire

SUPREME COURT OF THE UNITED STATES

No. 94-1387

Yamaha Motor Corporation, U.S.A., et al.,

Petitioners

v.

Lucien B. Calhoun, etc., et al.,

ORDER ALLOWING CERTIORARI. Filed May 22, 1995.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted limited to question 1 presented by the petition. In addition to question 1 presented by the petition, the parties are requested to brief and argue the following question: "Under 28 U.S.C. Section 1292(b), can the Courts of Appeals exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the District Court?"

May 22, 1995